ORIGINAL

Supreme Court, U.S.
FILED
MAY 8 2002
CLERK

NO. 01-1475

IN THE
SUPREME COURT OF THE UNITED STATES

THE STATE OF TEXAS,
Petitioner

v.

WILFREDY RENE VICIOSO,
Respondent

On Petition for a Writ of Certiorari to the
Court of Appeals, Tenth District of Texas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Andy J. McMullen, Lawyer
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State Court-Appointed Attorney for
Wilfredy Rene Vicioso

14 pp

Lack of Jurisdiction

Respondent pled guilty in the trial court below on April 16, 2002, to the offense alleged in the indictment in this case and received a sentence of thirty-two (32) years in the Institutional Division of the Texas Department of Criminal Justice. Certified copies of the documents filed in this case in the District Court of Hamilton County, Texas, 220th Judicial District, with reference to Respondent's plea of guilty are attached.

Petitioner failed to comply with Article 44.01(d) of the *Texas Code of Criminal Procedure* since the Petition for *Writ of Certiorari* was filed more than fifteen (15) days after the Mandate was issued by the Texas Court of Appeals below on February 22, 2002.

Challenges and Supplementation to Petitioner's "Statement of the Case"

Respondent challenges the factual statement appearing at the bottom of page 2 of the Petition for *Writ of Certiorari* ("the Petition" herein):

> It is not entirely clear why Respondent was taken into custody, although he was with Gomez at the time her vehicle was stopped, and the deputies knew he had been residing with her and that he had previously engaged in burglaries.

Deputy Sheriff Howard Westmoreland testified that Wilfredy Vicioso was taken to jail so that he could be questioned as a suspect in burglaries. There was no testimony presented that, at the time of Respondent's arrest, the officers knew that Respondent had "previously engaged in burglaries."

Respondent challenges the following statement appearing on page 3 of the Petition:

> Within a short time, Heath thoroughly searched Respondent, apparently to make certain he was not armed with a weapon.

There was no testimony as to why Respondent was searched by Deputy Sheriff Heath. However, while present in the interrogation room, Respondent was subjected to a strip search and a body cavity search.

Petitioner's "Statement of the Case" should be supplemented to advise the Court that on April 16, 2002, in the District Court of Hamilton County, Texas, 220th Judicial District, Respondent pled guilty to the indictment in this case and received a prison sentence of thirty-two (32) years.

Reasons Not to Review

1. Respondent has pled guilty to the indictment in this case and has been sentenced.

2. The Texas Court of Appeals' determination of whether Respondent had been arrested was made based upon Texas law, specifically Article 15.22 of the *Texas Code of Criminal Procedure*. The Court also relied upon the *Texas Code of Criminal Procedure §§ 14.01* through *14.06* to determine if the warrantless arrest of Respondent was proper. The Court of Appeals below also determined that the statement of Respondent should be excluded under Article 38.23(a) of the *Texas Code of Criminal Procedure*. The harm analysis was conducted by the Texas Court of Appeals below in accordance with *Texas Rules of Appellate Procedure 44.2(a)*. Therefore, the action of the Texas Court of Appeals below was substantially a product of its analysis and application of applicable state law to the facts before it.

3. The Opinion of the Texas Court of Appeals below is correct. As stated

by that Court in the majority Opinion:

> The source and nature of the error here was a blatant violation of Vicioso's Fourth Amendment rights by law enforcement officers. Declaring the error harmless would not encourage law enforcement to follow the Constitution as well as Chapter 14 [of the *Texas Code of Criminal Procedure*] in the future.

Conclusion

Vicioso urges the Court to deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,

Andy J. McMullen, Lawyer
P. O. Box 706
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(254) 386-8191
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SBOT: 13804000

State Court-Appointed Attorney for
Wilfredy Rene Vicioso, Respondent

AFFIDAVIT OF SERVICE

STATE OF TEXAS

COUNTY OF HAMILTON

BEFORE ME the undersigned authority, on this day personally appeared Andy J. McMullen, who having been by me duly sworn, upon his oath did depose and state as follows:

"1. I, Andy J. McMullen, of lawful age, being duly sworn, upon my oath state that I did, on the 3rd day of May, 2002, send out,

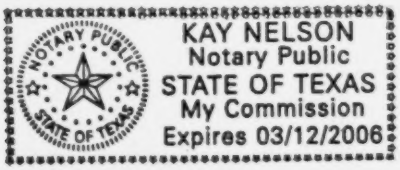
postage pre-paid from Hamilton, Texas, one package containing three copes of Brief in Opposition to *Writ of Certiorari* in the above entitled case. All parties required to be served have been served. Proper postage was affixed to said envelope, and it was plainly addressed to the following:

Martin L. Peterson
Assistant District Attorney
220th Judicial District
P. O. Box 368
Meridian, TX 76665

who is counsel of record for Petitioner."

Andy J. McMullen

SWORN TO AND SUBSCRIBED BEFORE ME, a Notary Public, by Andy J. McMullen, this 3rd day of May, 2002. I am duly authorized under the laws of the State of Texas to administer oaths.



Kay Nelson
Notary Public, State of Texas

BEST AVAILABLE COPY

NO. 99-06-07039-HCCR

THE STATE OF TEXAS

VS.

WILFREDO RENE VICIOSO

IN THE DISTRICT COURT OF

HAMILTON COUNTY, TEXAS

220TH JUDICIAL DISTRICT

AGREED PUNISHMENT RECOMMENDATION

INDICTED OFFENSE(S): BURGLARY OF A HABITATION, HABITUAL

It is mutually agreed and recommended to the Court by the Parties that upon the Defendant's Plea of Guilty and Judicial Confession of guilt, and agreement that there is sufficient evidence to require the amount of restitution set forth in accordance with art. 42.037 (k), C.C.P., the disposition of this case be as follows:

( ) Prosecution shall proceed only on Count(s) _____ of the Indictment or on the lesser included offense of _____

( ) Class A Misdemeanor Punishment (with Third Degree Felony Conviction) is recommended pursuant to Section 12.44 P.C.;

( ) Court shall take into account, in determining the sentence for the charged offense, the Defendant's guilt for the unadjudicated offense(s) of _____ as admitted by Defendant in accordance with §12.45 (a), Penal Code, so that prosecution thereof will be barred.

( ) there be a Deferred Adjudication of Guilt for a term of _____ years and Defendant be placed on community supervision for pursuant to art. 42.12 §5, C.C.P. upon conditions as determined by the court;

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( ) A fine of $ _____ be assessed;

(X) Confinement for 32 years in the Institutional Division, Texas Department of Criminal Justice be assessed; concurrent w/ 7186.

( ) Confinement for _____ months in the County Jail be assessed;

( ) After conviction, Defendant's sentence be suspended for a term of _____ years and Defendant be placed on community supervision pursuant to art. 42.12 §3, C.C.P. **upon conditions as determined by the court;**

Defendant will execute a written waiver of any right to: (1) file a motion for new trial, (2) file a motion in arrest of judgment and (3) appeal.

~~RECOMMENDED AND AGREED CONDITIONS OF COMMUNITY SUPERVISION~~
~~(In addition to standard or mandatory conditions)~~

( ) Defendant be ordered confined for _____ days in the county jail pursuant to art. 42.12 §12 (a), C.C.P.

( ) Defendant be ordered to reimburse the Texas Department of Public Safety for analysis of materials seized in connection with the offense in accordance with art. 42.12 §11 (a) (19), C.C.P.

( ) Defendant be ordered to pay restitution in the amount of $_____ with credit for any amounts paid by any convicted Co-Defendant(s), in accordance with art. 42.037 (h)(j)(k), C.C.P.

( ) Defendant be required to work _____ (160 to 600) hours at a community service project or projects for an organization or organizations approved by the judge and designated by the CSCD, in accordance with art. 42.12 §16 (a), (b)(4), C.C.P.

( ) Defendant be ordered to serve a term of confinement and treatment in a substance abuse treatment facility operated by the Texas Department of Criminal Justice followed by Defendant's satisfactory completion of a drug and/or alcohol abuse continuum of care treatment plan, pursuant to art. 42.12 §14, C.C.P.

( ) Defendant be ordered to remain under custodial supervision in a community corrections facility, obey all rules and regulations of such facility, and pay a percentage of his/her income to the facility for room and board, in accordance with art. 42.12 §11 (a)(12), C.C.P.

( ) Defendant be ordered to pay part of the reasonable and necessary costs incurred by the victim(s) for psychological counseling in accordance with art. 42.12 §11 (a)(20), C.C.P.

( ) Defendant be ordered to attend an educational program, approved by the Texas Commission on Alcohol & Drug Abuse under rules adopted by the commission and the Department of Public Safety, that is designed to educate persons on the dangers of drug abuse, in accordance with §521.374 of the Transportation Code, and attend counseling sessions for substance abusers, in accordance with art. 42.12 §11(a)(15), C.C.P.

(X) State represents no other pending investigations of Defendant in 220th Judicial District

(*) Parties agree that this court has jurisdiction to render judgment at this time despite pendency of Cause No. 01-1475 in Supreme Court of United States, which will become moot when such judgment becomes final

(X) Credit for time served from 5/12/99

(X) No deadly weapon finding.

All parties understand that, in the event the Court rejects this recommendation, the Defendant will be permitted to withdraw his/her plea and no statement or other evidence received during the plea may be admitted against the Defendant on the issue of guilt or punishment in any subsequent criminal proceeding, in accordance with Art. 26.13 C.C.P. Furthermore, if the Court sets punishment at or below this recommendation, the Defendant understands that no appeal is possible without the permission of the Court.

Agreed this 16 day of April, 2002

W. Grady Jimmerson
Defendant

Andy J. Mulholland
Attorney for the Defendant

Martin L. Peterson
Prosecutor

STATE OF TEXAS)
COUNTY OF HAMILTON)
I LEOMA LARANCE DISTRICT CLERK, IN AND FOR THE COUNTY AND STATE ABOVE NAMED DO HEREBY CERTIFY THAT THE WITHIN INSTRUMENT IS TRUE AND CORRECT COPY OF THE INSTRUMENT NOW ON FILE IN MY OFFICE.
16th DAY OF April 2002
BY Leoma Larance DEPUTY
LEOMA LARANCE DISTRICT CLERK

Written Plea Admonishment
220th Judicial District
Bosque, Comanche, and Hamilton Counties

NO. 99-06-07039-HCCR **DATE:** April 16, 2002

DISTRICT COURT OF HAMILTON COUNTY

TO: WILFREDO RENE VICIOSO, DEFENDANT

Pursuant to Art. 26.13 C.C.P., you are hereby admonished in writing:

APR 16 2002

1. You are charged with the felony offense(s) of:
BURGLARY OF A HABITATION, HABITUAL

2. If convicted, you face the range of punishment checked below:

( ) **FIRST DEGREE FELONY**: Imprisonment for life or for any term of not more than 99 years or less than 5 years in the Institutional Division of the Texas Department of Criminal Justice and, in addition, a possible fine not to exceed $10,000

( ) **SECOND DEGREE FELONY**: Imprisonment for any term of not more than 20 years or less than 2 years in the Institutional Division of the Texas Department of Criminal Justice and, in addition, a possible fine not to exceed $10,000

( ) **THIRD DEGREE FELONY**: Imprisonment for any term of not more than 10 years or less than 2 years in the Institutional Division of the Texas Department of Criminal Justice and, in addition, a possible fine not to exceed $10,000

(X) **HABITUAL OFFENDER**: Imprisonment for life or for any term of not more than 99 years or less than 25 years in the Institutional Division of the Texas Department of Criminal Justice

( ) **FIRST DEGREE FELONY ENHANCED**: Imprisonment for life or for any term of not more than 99 years or less than 15 years in the Institutional Division of the Texas Department of Criminal Justice and, in addition, a possible fine not to exceed $10,000

If the State is recommending prosecution only for a lesser included offense, then the range of punishment for that offense is as follows:

( ) **STATE JAIL FELONY**: Confinement in a state jail for any term of not more than two years or less than 180 days and, in addition, a possible fine not to exceed $10,000

( ) **CLASS A MISDEMEANOR**: A fine not to exceed $4000 or confinement in jail for a term not to exceed one year; or both such fine and confinement

( ) **CLASS B MISDEMEANOR**: A fine not to exceed $2000 or confinement in jail not to exceed 180 days; or both such fine and confinement

3. PLEA BARGAINS: If no plea bargain exists, the recommendation of the prosecuting attorney is not binding on the Court. If a plea bargain does exist, the Court will inform you whether it will follow the

agreement in open court and before any finding on your plea. Should the Court reject the agreement, you will be entitled to withdraw your plea. There shall be no binding agreements regarding the conditions of community supervision.

4. PERMISSION TO APPEAL: If the punishment assessed does not exceed the agreement between you and the prosecutor, the Court must give permission before you can appeal on any matter in the case except for matters raised by written motion(s) filed and ruled upon by the Court before trial. If no plea bargain exists, then your plea of guilty or nolo contendere will waive appellate review of any nonjurisdictional error occurring prior thereto.

5. CITIZENSHIP: If you are not a U.S. citizen, a plea of guilty or nolo contendere may result in deportation, the exclusion from admission to this Country, or denial of naturalization under Federal Law.

6. DEFERRED ADJUDICATION: If the Court defers adjudicating your guilt and places you under community supervision, you are entitled to file a written motion requesting final adjudication within thirty (30) days after entering you plea and the deferment of adjudication, and the judge shall proceed to final adjudication. On violation of any condition of community supervision imposed, you may be arrested and detained as provided by law. You are then entitled to a hearing limited to a determination by the Court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, all proceedings, including assessment of punishment anywhere within the range provided by law for this offense, pronouncement of sentence, granting of community supervision and your right to appeal continue as if adjudication of guilt had not been deferred.

THE FOREGOING ADMONISHMENTS WERE GIVEN TO DEFENDANT ON THE DATE ABOVE NOTED.

JUDGE PRESIDING

WAIVER OF RIGHTS AND AGREEMENTS IN CONNECTION WITH PLEA OF GUILTY

Comes now the Defendant, joined by my attorney, and states:

"1. I have read and fully understand the foregoing admonishments from the Court and am aware of the consequences of my plea, including the possible punishment.
"2. I am sane and I understand the nature of the charges contained in the indictment or information in this cause.
"3. I am mentally competent and **my plea is freely and voluntarily made.**
"4. Should my attorney be just recently appointed, I waive any minimum time provided by law for counsel to prepare for trial. I am totally satisfied with the representation provided by my attorney, who has provided fully effective and competent representation.
"5. Under Art. 1.14 C.C.P., I give up all rights given to me by law, whether of form, substance or procedure.
"6. I understand that I have the right to a trial by jury whether I plead 'guilty', 'not guilty', or 'nolo contendere'. Joined by my attorney, I give up the right to a jury in this case under Art. 1.13 C.C.P., both as to my guilt and assessment of my punishment, and my right to the appearance, confrontation and cross-examination of the witnesses under Art. 1.15 C.C.P.
"7. I give up my right to remain silent. Instead, I will sign a written judicial confession admitting my guilt and I agree to testify under oath if requested by the State's attorney. I consent to oral and written stipulations of evidence and to the introduction of affidavits or other statements of witnesses.
"8. I waive the reading of the indictment or information. I have read, and my attorney has explained to me, the indictment or information filed against me.

"9. I give up my right to confidentiality, pursuant to Art. 42.12 C.C.P. Section 9(j) if a presentence report is filed; and I agree that the report may be publicly filed in this case.
"10. I ask the Court to hear all the evidence, both as to guilt and my punishment, in one proceeding.
"11. I waive any waiting period for sentencing.
"12. I enter a plea of guilty. No one has threatened, coerced, forced, persuaded, nor promised me anything to enter such plea other than the punishment recommendation to be made by the prosecutor. I request the Court to accept my plea and set my punishment in accordance with the recommendation of the State's attorney.

Defendant

ATTORNEY'S CERTIFICATE: I have fully reviewed and explained to the Defendant the above and foregoing admonishments, rights, and waivers. I am fully satisfied the Defendant understands each and is legally competent to stand trial.

Attorney for Defendant

The State hereby consents to and approves the Defendant's waiver of right to trial by jury.

Martin L Peterson

Prosecutor

It clearly appearing to the Court that the Defendant is sane and competent to stand trial and is represented by competent counsel and that the Defendant understands the nature of the charge(s) against him/her and that he/she has been by the Court warned of the consequences of a plea of guilty or nolo contendere including the minimum and maximum punishment provided by law, that the attorneys for the Defendant and the State consent and approve the waiver of a trial by jury and agree to stipulate the testimony in this case; the Court, therefore, finds the Defendant's plea, waiver and consent to be voluntarily made and accepts the Defendant's plea, and approves the waiver of a jury herein and the consent to stipulate testimony.

Presiding Judge

COUNTY COURT OF HAMILTON COUNTY, TEXAS

STATE OF TEXAS)
COUNTY OF HAMILTON)
I LEOMA LARANCE DISTRICT CLERK, IN AND FOR THE COUNTY AND STATE ABOVE NAMED DO HEREBY CERTIFY THAT THE WITHIN INSTRUMENT IS TRUE AND CORRECT COPY OF LIKE INSTRUMENT NOW ON FILE IN MY OFFICE.
10th DAY OF April 2002
BY Leoma Larance DEPUTY
LEOMA LARANCE DISTRICT CLERK

NO. 99-06-07039-HCCR

THE STATE OF TEXAS		IN THE DISTRICT COURT OF
VS.	APR 16 2002	HAMILTON COUNTY, TEXAS
WILFREDO RENE VICIOSO		220TH JUDICIAL DISTRICT

STIPULATION OF EVIDENCE

COMES NOW WILFREDO RENE VICIOSO, the Defendant in the above entitled and numbered cause, in writing and in open court, and consents to the stipulation of the evidence in this case and in so doing expressly waives the appearance, confrontation and cross-examination of witnesses. I further consent to the introduction of testimony by affidavits, written statements of witnesses and other documentary evidence. Accordingly, having waived my federal and state constitutional rights against self-incrimination and after having been sworn, upon oath, I judicially confess to the following facts and agree and stipulate that these facts are true and correct and constitute the evidence in this case:

on or about the 22nd day of April, 1999, in Hamilton County, Texas, with intent to commit theft, I intentionally and knowingly entered a habitation, without the effective consent of Dawn Mills, the owner thereof; and

I intentionally and knowingly entered a habitation, without the effective consent of Dawn Mills, the owner thereof, and committed theft by unlawfully appropriating property, to wit: a Sanyo stereo and CD player, a television, a Primestar receiver, a video cassette recorder, musical Cds, and jewelry, with intent to deprive the owner of property,

AND I have been convicted of two felony offenses, to wit: on September 14, 1989 of grand theft and possession of cocaine in Cause No. F89-025891 in the 11th Circuit Court of Dade County, Florida, and on February 3, 1993 of burglary of unoccupied conveyance and drug trafficking-conspiracy in Cause Nos. F91-041794D and F92-040535 in the 11th Circuit Court of Dade County, Florida, and that the second previous convictions were for offenses that occurred subsequent to the first previous conviction(s) having become final.

Wilfredo Vicioso
Defendant

SX-1
DLM
4-16-02

SWORN TO AND SUBSCRIBED BEFORE ME THE UNDERSIGNED AUTHORITY

THE 16th DAY OF April, ~~1999~~ 2002.

Leoma Larance
Clerk, District Court, Hamilton County

APPROVED:

Attorney for the Defendant

APPROVED BY THE COURT:

Judge Presiding

STATE OF TEXAS)
COUNTY OF HAMILTON)
I LEOMA LARANCE DISTRICT CLERK, IN AND FOR THE COUNTY AND STATE ABOVE NAMED DO HEREBY CERTIFY THAT THE WITHIN INSTRUMENT IS TRUE AND CORRECT COPY OF LIKE INSTRUMENT NOW ON FILE, IN MY OFFICE.
16th DAY OF April 2002
BY Leoma Larance DEPUTY
LEOMA LARANCE DISTRICT CLERK

NO. 99-06-07039-HCCR

THE STATE OF TEXAS

VS.

WILFREDO RENE VICIOSO

IN THE DISTRICT COURT OF

HAMILTON COUNTY, TEXAS

220TH JUDICIAL DISTRICT

DEFENDANT'S WAIVER OF MOTION FOR NEW TRIAL

Now comes the Defendant in open Court in the above-entitled and numbered cause, represented by my Attorney with whom I have previously consulted and understanding that I, the Defendant, have the legal right to file a Motion for New Trial or Motion in Arrest of Judgment, and also the right to be represented on such motions by the Attorney of my choice or if I am too poor to pay for such Attorney or the Record on Appeal, the Court will, without expense to me provide an Attorney and a proper record for such motions, but after consulting with my Attorney I voluntarily, knowingly, and intelligently, waive my right to file a Motion for a New Trial or in Arrest of Judgment and request the Court to sentence me at this time. I further know of no reason why sentence should not be pronounced.

APR 16 2002

Date: 16 day of April, 2002.

W. Rudy Vicioso
Defendant

Approved:

Attorney for Defendant

STATE OF TEXAS)
COUNTY OF HAMILTON)
I LEOMA LARANCE DISTRICT CLERK, IN AND FOR THE COUNTY AND STATE ABOVE NAMED DO HEREBY CERTIFY THAT THE WITHIN INSTRUMENT IS TRUE AND CORRECT COPY OF LIKE INSTRUMENT NOW ON FILE IN MY OFFICE.
16th DAY OF April 2002
BY Leoma Larance DEPUTY
LEOMA LARANCE DISTRICT CLERK

NO. 99-06-07039-HCCR

THE STATE OF TEXAS — IN THE DISTRICT COURT OF

VS. — HAMILTON COUNTY, TEXAS

WILFREDO RENE VICIOSO — 220TH JUDICIAL DISTRICT

DEFENDANT'S WAIVER OF APPEAL

TO THE HONORABLE COURT:

NOW COMES THE DEFENDANT IN THIS CAUSE, HAVING CONSULTED WITH MY ATTORNEY, AND STATE AS FOLLOWS: I UNDERSTAND THAT I HAVE THE LEGAL RIGHT OF APPEAL FROM THE JUDGMENT WHEREBY I HAVE BEEN CONVICTED AND TO HAVE THE PROCEEDINGS REVIEWED BY THE TENTH COURT OF APPEALS IN WACO, TEXAS, AND THAT IF I AM TOO POOR TO PAY FOR AN ATTORNEY TO ASSIST ME OR FOR THE RECORD ON APPEAL, THE COURT WILL, WITHOUT EXPENSE TO ME, PROVIDE AN ATTORNEY AND A PROPER RECORD FOR SUCH AN APPEAL. NEVERTHELESS, BEING SATISFIED WITH SUCH JUDGMENT AND THE SERVICES OF MY ATTORNEY, I HEREBY VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVE MY RIGHT TO APPEAL AND AGREE THAT I WILL NOT ATTEMPT TO APPEAL FROM SUCH JUDGMENT.

TENDERED: 16 DAY OF April, ~~1999~~ 2002 APR 16 2002

Wilfredo Vicioso
DEFENDANT

I BELIEVE MY CLIENT FULLY UNDERSTANDS H'S RIGHT OF APPEAL AND DESIRES FOR VALID REASONS TO WAIVE SUCH RIGHT.

Attorney for Defendant

STATE OF TEXAS)
COUNTY OF HAMILTON)
I LEOMA LARANCE DISTRICT CLERK, IN AND FOR THE COUNTY AND STATE ABOVE NAMED DO HEREBY CERTIFY THAT THE WITHIN INSTRUMENT IS TRUE AND CORRECT COPY OF LIKE INSTRUMENT NOW ON FILE IN MY OFFICE.
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LEOMA LARANCE DISTRICT CLERK